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NTSB Order No. EA-5179

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of September, 2005

MARION C. BLAKEY Administrator, Federal Aviation Administration, Complainant, v. W.H.M.J. VAN DER HORST, Respondent.	Docket SE-17136

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on November 5, 2004.[1] By that decision, the law judge upheld, in part, the Administrator's Order of Suspension, which sought a 180-day suspension of respondent's commercial pilot certificate with lighter-than-air rating for alleged violations of sections

[1] An excerpt from the hearing transcript containing the law judge's decision is attached.

91.7(a) and 91.13(a) of the Federal Aviation Regulations (FARs).[2] We grant respondent's appeal.

Respondent admitted the Administrator's factual allegations, specifically:

> 1. At all times pertinent herein, you held Airman Certificate No. 379324988 with commercial pilot privileges and lighter-than-air free balloon rating.
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> 2. On October 5, 2003, at approximately 07:50 hours, MDT, you were pilot in command of a Lindstrand Balloon, Model A-150, S/N 104, civil aircraft N994AF, on [a] passenger carrying flight in commercial operations, that departed from a public park in the Taylor Ranch area in New Mexico.
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> 3. Shortly after taking off, N994AF began a rapid descent and it collided with a cement wall which caused damage to the balloon envelope and injury to the passengers.
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> 4. Immediately after the incident described in paragraph 3 above, you departed on a second passenger carrying flight in commercial operations.
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> 5. The Lindstrand Balloon Flight Manual, Section 1 "Operational Limitations," Subsection 1.1.2 states:
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> > "The balloon must not be flown if there is any damage to the envelope fabric which is above the first 4 [meters] and is larger than 25 [millimeters] (1") in any one direction, or closer than 19 [millimeters] (3/4") to any load tape. No damage is permitted to

[2] FAR section 91.7(a) prohibits operating an aircraft unless it is airworthy, and FAR section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

> load tapes, suspension system, burners or fuel system components."

Complaint at 1-2. The hearing, therefore, focused on the only allegation respondent denied: "Your actions were careless in that, on October 5, 2003, when you departed on the second passenger carrying flight after N994AF had been damaged, you endangered the lives of those passengers and the property of another."

At the hearing, the Administrator offered testimony by FAA Aviation Safety Inspector James Malecha, who investigated the case, and George Hahn, an FAA-designated balloon pilot examiner and general manager and owner of Airco, an FAA-licensed balloon repair facility. The Administrator also introduced the sworn declaration of Simon Forse, the Chief Engineer and Managing Director of Lindstrand Hot Air Balloons, Ltd., the manufacturer of the accident balloon.

Mr. Forse, in his declaration, explained the flight manual limitation in section 1.1.2 was intended, "to permit non-critical lower envelope burn damage to remain un-repaired for several flights, but not longer than the next 100 hour/annual inspection. This sentence may be accurately interpreted as permitting the removal of all of the fabric below the 4 m level and maintaining airworthiness, but this was not intended." He also explained that, "undamaged load tapes are perfectly capable of supporting the flight loads. It is the upper half of the envelope that generates the lift." And, "[l]oad tape damage is fairly simple to detect by visual inspection. If there is no evidence of heat

scoring or melting or a reduction in flexibility, then they do not need to be replaced." Finally, he explained that the, "only limitation to damage below the four meter level pursuant to the operating limitations would be that there must not be any damage whatsoever to the load tape or suspension systems including the flying wires and tape to flying wire joints."

Inspector Malecha testified that he has approximately 12 hours of flight experience in balloons. He testified that he examined the damage to the accident balloon, and observed that there was a burn hole extending vertically 102 inches from the throat (e.g., the bottom of the balloon envelope) and 129 inches wide. There was no damage above the first four meters of the balloon envelope. Inspector Malecha also testified that within the area of burn the fabric had been burned away up to the load tapes; but he conceded that he did not examine the load tapes themselves for damage. Inspector Malecha authenticated several pictures of the balloon that document the extent of the burn damage. He testified that in his opinion the balloon was unairworthy, because with the fabric burned up to the load tapes it exceeded the limitations in the manual that specified a minimum of three-quarters of an inch from the load tapes. Finally, he testified that respondent was careless in flying the balloon after it suffered the burn damage since a prudent pilot would have deflated the balloon so as to be able to effectively inspect the load tapes, and other components, for damage before continuing flight.

Mr. Hahn testified that he has approximately 3,200 hours of flight time in balloons. He testified that his business conducted 183 annual inspections on balloons in 2003, and that he anticipated conducting approximately 196 annual inspections in 2004. Mr. Hahn testified that his business conducts approximately three to four hundred burn repairs on balloons per year, and that typically he only sees damage as extensive as that respondent's balloon incurred "once or twice a year." Hearing Transcript ("Tr.") at 61. Mr. Hahn explained that if the load tapes are damaged, they can come apart and cause the balloon to deflate while airborne, causing serious injury or fatalities to persons aboard the balloon. He testified that he believed the balloon was unairworthy, and that a prudent balloon pilot would have deflated the balloon to inspect the balloon and ensure that there was no damage to the load tapes before continuing flight.

Both Mr. Hahn and Inspector Malecha testified that respondent could not have adequately inspected the condition of the load tapes prior to his flight since the distance, up to approximately 20 feet from respondent while in the balloon basket, was too great for an effective inspection while the balloon was inflated.

Respondent testified that he has held a commercial pilot license with balloon rating since 1974, and has accumulated approximately 3,700 hours of flight time in balloons. Respondent testified that after his balloon suffered burn damage and before making the flight at issue, he determined that there was no

damage to the load tapes. Specifically, he testified, in relevant part:

> I … looked at the area of the damage, and since I had had the experience with burned areas because of students, I ascertained that the load tapes were not damaged, because the material was still on the back of the load tapes, so if that had been burned off, I would have been on the ground immediately…. I had a sufficient amount of time to really look, whatever I could see, which is not that far away, just about five meters away, but you can see pretty much what's going on. Especially because the tapes still being white, I'm assured that it was okay…. [T]he material, the balloon material that was sewn on the back of the load tapes during the construction, have not been burned off. So the heat was not sufficient to burn that part off, and therefore the load tape certainly would not have been impacted.

Tr. at 83-85. Respondent denied that the balloon was not airworthy, and claimed that he did a sufficient preflight inspection to determine this after incurring the burn damage and before taking off again with new passengers.

Finally, respondent presented the testimony of Brent Stockwell, an experienced balloon pilot and FAA-designated pilot examiner for balloons. Mr. Stockwell testified, based on a review of the balloon damage pictures, that the balloon was airworthy and that respondent could have adequately assessed the condition of the load tapes from his position in the basket.

At the conclusion of the hearing, the law judge dismissed the section 91.7(a) charge, finding that the Administrator failed to carry her burden of proving that the balloon was unairworthy.[3]

[3] The Administrator did not appeal the dismissal of the

As the law judge put it, the "government has not clearly established that … the balloon … was unairworthy, because nobody really inspected these [load] tapes. They may have been or they may not have been [airworthy], but the burden of proof is on the Administrator…." Tr. at 113-114. However, the law judge found that respondent was careless in not more carefully inspecting the balloon before flight to ensure that its load tapes were not damaged. The law judge modified the 180-day suspension sought by the Administrator to a 100-day suspension, but he did not explain the rationale for how he determined the new sanction period.

On appeal, respondent argues that the Administrator's complaint did not put him on notice that, as the law judge found in upholding the section 91.13(a) charge, his preflight inspection of the burn damage was insufficient.[4] We agree. A fair reading of the Administrator's complaint indicates that both the section 91.7(a) and the section 91.13(a) charges were premised upon a case theory that respondent's balloon was damaged to such an extent that it was unairworthy, but the Administrator did not prove this key fact. The complaint did not provide respondent with adequate notice that he must defend against an independent charge of carelessness based on an inadequate

(..continued)
section 91.7(a) charge.

[4] In light of our disposition of this case, we need not reach respondent's argument that the sanction imposed by the law judge was excessive.

preflight.[5] As we said in Administrator v. Moore, NTSB Order No. EA-4929 at 10 (2001), "[w]hether respondent was careless and whether he was on notice that he was being charged with being careless independent of the [operational violation cited in the complaint] are two separate questions."[6]

Accordingly, it was prejudicial error for the law judge to uphold the section 91.13(a) violation on grounds not adequately described in the complaint. See, e.g., Administrator v. Gerdts, NTSB Order No. EA-4938 at 5-6 (2002) (granting an appeal of a finding of a violation of section 91.13(a) where the, "complaint does not mention the theory under which the law judge held respondent … accountable").

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;
2. The law judge's decision is reversed, in part; and
3. The Administrator's complaint is dismissed.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS and HERSMAN, Members of the Board, concurred in the above opinion and order.

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[5] The Administrator does not appear to contest this. See Administrator's Reply Brief at 4 (stating, in the context of an argument about proper sanction, "the suspension times in those cases were based on 'failure to preflight' *which is not what the Administrator alleged*") (emphasis added).

[6] We have no doubt that an airman could, in a hypothetical case, be proven careless in not conducting a proper preflight inspection even where an aircraft turns out, fortuitously but without advance preflight verification, to be airworthy. This is, essentially, the law judge's rationale in upholding the section 91.13(a) charge. The issue here, however, is whether respondent was put on notice of having to defend such a charge.